



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

NOV 14 2000

MEMORANDUM FOR CHERYL HARSKOWITCH
DIRECTOR, TAXPAYER ACCOUNT OPERATIONS
C:TA:TAO

FROM: Carol A. Campbell *CAC*
Technical Advisor to Counsel to the National Taxpayer Advocate
CC:NTA

SUBJECT: Interest Abatement for IRS Audit Delays

This memorandum is provided in response to a request for further clarification and comment on a previously issued memorandum regarding interest abatement. By memorandum dated June 10, 1999 (attached), the former Field Service Division issued an opinion on the authority to abate interest in cases where delay in the completion of a taxpayer audit is directly related to the actions of the Internal Revenue Service ("Service"). This discretionary authority to abate interest due to unreasonable delays and errors on the part of the Service is found in I.R.C. § 6404(e).

The issue of specific concern in the attached memorandum was delay attributable to Customer Service reassignments during filing season. In seeking clarification, additional facts were also provided to further reflect actual interest abatement issues. The facts on which this memorandum is based were supplied by Jackie Bracey, Local Taxpayer Advocate for the state of North Carolina. As this issue is now within the jurisdiction of the Assistant Chief Counsel for Administrative Provisions and Judicial Practice, we sought the views of that office and those views are incorporated in this response.

FACTS

Taxpayer's income tax returns for the [REDACTED] and [REDACTED] tax years were opened for audit on July 10, 1997, and September 3, 1998, respectively. The original examiner assigned to the case retired and the case was reassigned on November 20, 1998. The audits were concluded on December 10, 1999. The second auditor, however, did not work on this case for the ten month period beginning November 20, 1998, and ending September 20, 1999. There were three causes for the delay in completing these examinations, they were:

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(1) Workload prioritization - November 1998 through January 1999. Division policy required cases with expiring statutes and TAS cases to be worked before other examination cases. The remaining cases were worked in chronological order with older cases being worked first.

(2) Reassignment to Customer Service - February 1, 1999 through April 15, 1999. Almost the entire examination group was reassigned to Customer Service during the filing season.

(3) Auditor training - June 21, 1999 through September 20, 1999. The auditor assigned to this case was sent to training during this period and the cases were not reassigned.

None of these delays in completing the examinations were attributable to actions of the taxpayer and all delays took place after the Service contacted the taxpayer regarding the examination.

DISCUSSION

The analysis of the issues raised by this set of facts is different for the [REDACTED] and [REDACTED] tax returns. The reason for the difference is the applicable tax law. For tax years beginning before [REDACTED] the Service only had the ability to abate interest where the interest is attributable in whole or in part to an error or delay by an officer or employee of the Service performing a ministerial act. I.R.C. § 6404(e)(1).¹ Assuming that the taxpayer in this example is a calendar year filer, his/her tax year began on [REDACTED] thus, any interest on a deficiency or payment on his 1996 return could only be abated if attributable in whole or in part to a ministerial act. The delays outlined above do not constitute ministerial acts, as each of the delays involves the exercise of some judgment or discretion. Consequently, there is no legal basis for the abatement of interest under section 6404(e)(1) for the [REDACTED] tax year.

With regard to the [REDACTED] tax return, abatement for unreasonable IRS errors or delays is available for either ministerial or managerial acts. As indicated above, none of the delays presented on these facts constitute ministerial acts. The interest attributable in

¹ A ministerial act is "a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors have taken place. A decision concerning the proper application of federal tax law (or other federal or state law) is not a ministerial act." Treas. Reg. § 301.6404-2(b)(2).

whole or in part to these delays can only be abated, if the delays are determined to be caused by managerial acts.² A managerial act is "an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management of personnel." Treas. Reg. § 301.6404-2(b)(1). As indicated in this regulation, "a decision concerning the proper application of federal tax law (or other federal or state law) is not a managerial act. Further, a general administrative decision, such as the IRS's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system, is not a managerial act for which interest can be abated... ." Id.

Therefore, in order to abate interest based on the facts presented in this case, it has to be determined that the IRS delays were managerial and not general administrative decisions. Moreover, each delay has to be evaluated on its own merits. The cumulative effect of the delays is not relevant in determining whether interest can be abated.

November 1998 through January 1999

During this period, the new auditor assigned to this case did not work on the taxpayer's examination because of a policy established in the auditor's division requiring priority be given to cases with imminent statute expiration dates and cases referred by a TAS office. Determining which cases are to be worked and in what order is a workload priority issue. Workload prioritization issues are considered to be general administrative decisions and not managerial acts. See Example 8, Treas. Reg. § 301.6404-2(c). Interest cannot be abated for general administrative decisions. Consequently, interest cannot be abated because of the auditor's inability to work on this taxpayer's case during the period identified above.

February 1, 1999 and April 15, 1999

The examiner's Customer Service reassignment during the filing season also delayed the completion of the taxpayer's examination. Whether the reassignment is a managerial act upon which interest can be abated or is a general administrative decision precluding the abatement of interest will be determined by the specific facts. In this case, there is a reassignment of all or substantially all Examination employees in the examiners group to Customer Service based on a Service wide decision or policy. Because the reassignment involves all or substantially all of the examiners in a group or division, it is both reasonable and likely that this decision will be viewed as a general administrative decision, rather than a managerial act. The Service wide decision to

² The scope of section 6404(e)(1) was expanded to include delays for managerial acts by Taxpayer Bill of Rights II (Pub. L. No. 104-168, 110 Stat. 1452 (1996)).

reassign a manager's employees to another function leaves the manager without any ability or discretionary authority to reassign the auditor's cases to other employees, since all employees but one were reassigned consistent with the Service directive. These facts support a conclusion that the reassignment was a general administrative decision and not a managerial act.

On different facts, however, it may be possible to conclude that the delay constituted a managerial act. In a circumstance where only a small number of examiners on a particular manager's staff are reassigned to Customer Service and the manager has other employees to whom the pending examination cases could be assigned, but the manager does not reassign the cases and allows them to remain unworked, the outcome may be different. The decision not to reassign the examiner's cases is a managerial act. Thus, if the reassigned examiner's cases were not worked for an extended period of time and this delay was unreasonable, the manager's actions could provide a basis for the abatement of interest.³ See Example 3, Treas. Reg. § 301.6404-2(c).

June 21, 1999 through September 20, 1999

During this three month period the examiner attends a training course and the manager does not reassign the examiner's cases. Both the manager's decision to send the auditor to training and the decision not to reassign the examiner's cases during this absence are managerial acts. Accordingly, if it is determined that the three month period for training is an extended period of time and that the delay in working the taxpayer's case was unreasonable, there is discretion to abate the portion of the interest determined to be attributable to any unreasonable delay. Support for such a determination is found in Example 3, Treas. Reg. § 301.6404-2(c).

CONCLUSION

Interest abatement for unreasonable delays and errors by the Service under section 6404(e) of the Code is discretionary. The regulations implementing section 6404(e) are narrowly drawn and strictly interpreted. Therefore, in determining whether a case may qualify for interest abatement, it is important that all the specific facts be considered and evaluated in terms of the regulatory provisions.

In any instance where you have a question regarding the availability of interest abatement, we are available to provide assistance. Field advocates should be

³ Generally, the factors to be considered in determining whether a delay is unreasonable include (1) the processing time of the case at issue as compared to the normal processing time of an examination case; (2) the manager's reasons for not reassigning the case, and the availability of other auditor's in the group to work additional cases.

encouraged to take their questions with respect to this issue to their SB/SE point of contact. If you have additional questions regarding this memorandum, please advise.

Attachment



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

JUN 10 1999

CC:DOM:FS:PROC:PWF fuller
SPR-105733-99

MEMORANDUM FOR DIRECTOR OFFICE OF INTEREST AND PENALTY
ADMINISTRATION
OP:EX:ST:I&P
Attn: Pauline Riendeau

FROM: Chief, Procedural Branch *Sara M. Cole*
Field Service Division

SUBJECT: Delays Due to Customer Service Staffing/Interest Abatement

During the recent tax filing season, the Commissioner's office directed the temporary reassignment of Internal Revenue Service employees from Examination and (other functions) to Customer Service. Since the Internal Revenue Service committed itself to providing 24 hour assistance to customers, in many Districts almost every office had employees reassigned. As a result, there was a shortage of employees to work on tax matters that were already pending before the Service. There have been numerous questions asking if interest should be abated due to delays in the processing or examination of pending cases attributable to these reassignments. You have asked for our advice on whether the Service is authorized to abate interest in this situation.

For tax years beginning prior to July 31, 1996, Internal Revenue Code section 6404(e)(1) allows the Service to abate only interest on a deficiency or payment where the interest is attributable in whole or in part to an error or delay by an officer or employee of the Internal Revenue Service in performing a ministerial act. A ministerial act is a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a case after all prerequisites to the act have taken place. Temp. Treas. Reg. § 301.6404-2T(b)(1). In addition, error or delay may be taken into account only if the taxpayer has not significantly contributed to the error or delay and the error or delay must have occurred after the taxpayer has been contacted in writing with respect to the deficiency or payment. In enacting I.R.C. § 6404(e), Congress did not intend that the abatement of interest provision "be used routinely to avoid payment of interest." H.R. Rep. No. 426, 99th Cong., 1st Sess. 844 (1985); S. Rep. No. 313, 99th Cong., 2d Sess. 208 (1986). Rather Congress intended abatement

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of interest to be used in instances "where failure to abate interest would be widely perceived as grossly unfair." Id. The decision to reassign employees from Examination to Customer Service was not a ministerial act.

The Taxpayer Bill of Rights 2 (Pub. L. No. 104-168, 110 Stat. 1452 (1996)) expanded Internal Revenue Code section 6404(e)(1). For tax years beginning after July 30, 1996, section 6404(e)(1) now permits the Service to abate interest where there is an *unreasonable* error or delay in performing a *managerial* act. A managerial act is defined as an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management of personnel. Treas. Reg. § 301.6404-2(b)(1). Examples of managerial acts include the granting of leave for an extended period of time and the decision not to reassign a case during the employee's absence. See Treas. Reg. § 301.6404-2(c), example 5.

A general administrative decision is not a managerial act for which interest can be abated. Treas. Reg. § 301.6404-2(b)(1). The regulations provide two examples of a general administrative decision. One example involves a delay in commencing the examination of a taxpayer's return until the processing of another return, for which the statute of limitations is about to expire, is completed. Treas. Reg. § 301.6404-2(c), example 8. The example concludes that this is a general administrative decision because it is a decision on how to prioritize the processing of returns based on the expiration of the statute of limitations. The other example involves the decision to delay the processing of the return of a taxpayer, who has invested in a tax shelter and reported a loss from the tax shelter on the taxpayer's income tax return, until the completion of an examination of the tax shelter. Treas. Reg. § 301.6404-2(c), example 7. The example concludes that the decision to delay processing the taxpayer's return is a general administrative decision because it is a decision on how to organize the processing of tax returns.

The Commissioner's decision to allocate the Service's resources by temporarily assigning personnel to Customer Service is similar to the decisions made in examples 7 and 8 of section 301.6404-2(c) of the Regulations. Therefore, this decision is a general administrative decision on which abatement of interest may not be based. Accordingly, the Service is not authorized to abate interest that accrued as a result of the reassignment of employees from the Examination division (or any other function) to Customer Service.

If you have any questions, please contact Pamela Wilson Fuller at (202) 622-7950.